

HAWAII CONDOMINIUM BULLETIN

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Selected 1992 Legislative Acts Affecting Condominium Owners and Boards

The discussion of selected 1992 Acts in this issue of the Hawaii Condominium Bulletin is not and should not be construed as legal advice. Because this article only summarizes some of the changes made by the 1992 Acts, readers are advised to obtain and read the full text of the acts. They are also advised to seek the services of competent professionals should they need answers as to how the new laws may apply to their particular circumstance.

Act 189 Relating to Condominium Association and Budget. (H.B. NO. 3960, H.D.1, S.D.1, C.D.1) Effective January 1, 1993

Act 189 clarifies Act 132 (§514A-83.6, Hawaii Revised Statutes) which was enacted last year. Act 132 was promulgated to: ensure that condominium associations have adequate funding of replacement reserves; discourage deferring needed repair or replacement of common elements; and avoid occurrences of having to impose on owners large special assessments to pay for those repairs and replacements.

Act 132 had imposed basic, mandatory requirements to improve the solvency and financial planning of condominium associations. Among other things, Act 132 requires:

- 1) association boards to adopt a budget, distribute it to the owners, and follow it except in emergencies;
- 2) the budget to state the association's existing reserves;
- 3) the association to calculate how much it should have in reserves; and

- 4) the association to assess owners and fund the proper amount of reserves, subject to limited exceptions.

Act 189 amended and clarified Act 132 in the following significant respects:

- adds specific language making it clear that the associations are required to conduct a reserve study for all property they are obligated to maintain;
- permits the board to fund as little as 50% of the estimated replacement reserve amounts (instead of the 100% previously required under Act 132);
- permits existing associations to fund their estimated replacement

reserves by the end of 1999 (instead of by the end of 1998 as previously required under Act 132);

- permits an association to fund estimated replacement reserves that have been substantially depleted by an emergency over a three-year period (instead of the two-year period previously required under Act 132);
- expands the definition of "emergency" situation to include an extraordinary expense necessary to respond to any legal or administrative proceeding brought against the association that could not have been reasonably foreseen by the board in preparing

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This material can be made available for individuals with special needs. Please call the Senior Condominium Specialist at 586-2644 to submit your request.



Letter from the Chair. . .

Dear Condominium Owners:

*This issue of the **Hawaii Condominium Bulletin** is devoted to two major topics — new legislation and the Americans With Disabilities Act (ADA). The subject of this issue's Reference File includes a discussion of the ADA and how it may impact the operations of Condominium Associations.*

On June 12, Governor Waihee signed Act 189. The Act amends the budget and reserves section — Section 514A-83.6, HRS. Effective January 1, 1993, the reserve law grants associations accumulating replacement reserve funds for future major repairs and replacements an additional year — that is, until December 31, 1999. In addition, the reserve law now permits associations to set aside as little as 50 percent of the proportionate amount of reserves each year. Of course, when the full amount is needed for the repair or replacement, the rest of the money would have to be obtained from maintenance fees, a special assessment, or a loan.

The Real Estate Commission is continuing work on rules to clarify and provide further details on the reserve law. In June, the Hawaii Real Estate Research and Education Center convened a mini-task force consisting of condominium owners, board members, condominium managing agents, and a mortgage underwriter to assist in determining what subjects should be included in the reserve manual.

*For more details about the new legislation, please read the articles in this issue of the **Hawaii Condominium Bulletin**.*

Should you have questions concerning the information we have sent you, please feel free to write or call the Commission's Condominium Specialists (586-2646).

Very truly yours,

Stanley M. Kuriyama

*Chairman, Condominium and
Cooperative Review Committee*

Ask the Condominium Specialists

Q. My association's bylaws state that 75 percent of the common interest must approve any bylaw amendments. But Section 514A-82 (b) (2), Hawaii Revised Statutes, says only 65 percent is required. Which is correct?

A. Only 65 percent is required. All of the provisions of Section 514A-82 (b), Hawaii Revised statutes, are, by statute, deemed to be incorporated into the bylaws of all condominium projects, and therefore supersede all conflicting provisions which may be contained in an association's bylaws. (In contrast, the provisions of Section 514A-82 (a) are not expressly deemed to be incorporated into a project's bylaws.)

In order to minimize the risk of the confusion created between old bylaw provisions and new provisions required by statute, Section 514A-82.2, Hawaii Revised Statutes, permits a board, by resolution to restate an association's bylaws to conform with any provisions of Chapter 514A, Hawaii Revised Statutes.

Q. The board of directors of my condominium association always seems to have secret meetings excluding owners. Is this permissible under Chapter 514A, Hawaii Revised Statutes?

A. As a general rule, any organization may exclude non-members from its meetings. However, 514A-83.1, Hawaii Revised Statutes, provides that all board meetings, other than executive sessions, shall be open to all members of the association. The section further provides that non-board members may participate in any board deliberation or discussion unless a majority of a quorum of the board votes otherwise. The statute authorizes boards to enter into executive session to discuss issues relating to personnel or litigation in which the association is, or may be, involved. However, the business to be considered in executive session must first be announced at the open board meeting. You should also be aware that Section 514A-82 (b) (9), Hawaii Revised Statutes, requires boards whenever practicable to post meeting notices in prominent locations within the project either 72 hours before the meeting or at the same time notice of the meeting is given to the directors.

AMERICANS WITH DISABILITIES ACT

Protection For Individuals With Disabilities From Discrimination In Employment, Public Services, Transportation, Public Accommodations And Telecommunications Services

“Complying with ADA is not an easily charted course. The path to compliance is riddled with complicated definitions, flexible standards, and untested regulations. However, becoming familiar with the ADA is the important first step to making required adjustments that give disabled persons a better opportunity to compete in the workplace and greater access to society that they deserve.”^[1]

The ADA may contain pitfalls for unwary condominium associations.

Associations are advised to consult with the appropriate government agency for further information, or with an attorney for a more comprehensive analysis of how the ADA and state laws may impact a particular association. The names, addresses, and numbers of some government agencies are listed at the end of this article.

This article provides general information about ADA's Title I (employment) and Title III (public accommodations) provisions. These two Titles, together with corresponding state laws, may have an impact on association operations. Condominium board members, owners, managing agents and interested others should use this article as the beginning point for examining the implications of the ADA and related state laws.

HOW THE ADA AND RELATED STATE LAWS IN EMPLOYMENT AND PUBLIC ACCOMMODATION MAY IMPACT CONDOMINIUM ASSOCIATION OPERATIONS.

For certain condominium associations, a review of its operations may raise the issue of whether the ADA and related state laws apply to its employment practices and its public accommodations.

The ADA's provisions and state law, Chapter 489, HRS, prohibiting discrimination in public accommodations, and requiring accessible public accommodations, may apply when an association participates in any of the following activities:^[2]

- operates a condominium hotel providing lodging to transient guests;
- rents common areas for public gatherings;
- rents or leases common areas, or operates a restaurant, bar, or other establishment serving food or drink;
- rents or leases its common areas, or operates the common areas as a bakery, grocery store, clothing store, hardware store, shopping center, or other [types of] sales or rental establishment;
- rents or leases common areas as offices for: accountants; lawyers; insurance; nursery; places

of education, day care center etc.; or

- permits non-association members use of association swimming pools with purchased pool passes or rents the pool or recreation area.^[3]

Requirements of the ADA and Related State Laws In Employment and Public Accommodation.

EMPLOYMENT

Both the ADA and state law, (Chapter 378, HRS as amended SLH 1992), prohibit employers from discriminating against otherwise qualified individuals in employment. This includes job application procedures, hiring, advancement, discharge, compensation, job training, and other terms, conditions and privileges of employment. For example, a person with a disability such as deafness may not be barred from employment as a condominium resident manager solely because of the disability. Employers must make reasonable accommodations to permit the qualified employee to perform the job. For example, doors may need to be widened to accommodate an employee in a wheel chair. However, employers are not required to make a particular accommodation if the employer establishes that in complying: an "undue hardship" on the business will result, or that the accommodation poses a significant risk to the health or safety of others.

PUBLIC ACCOMMODATIONS

Both the ADA and state law, (Chapter 489, HRS), prohibit discrimination which deny persons with disabilities the full and equal enjoyment of the goods, services, facilities, privileges, advantage, or accommodations of any place of public accommodation. The ADA requires the affirmative removal of architectural and communications barriers that are structural in nature;^[4] such as the widening of doors and the repositioning of telephones.^[5] In contrast, related state law (§489-2, HRS) does not appear to require such affirmative action: "No place of public accommodation defined in this section shall be required to reconstruct any facility or part thereof to comply with this chapter." Because the ADA is more stringent than the state law, the ADA requirements will prevail. For the purposes of ADA, certain private entities are considered public accommodations^[6] when the operations of such entities affect commerce.^[7]

WHO MUST COMPLY WITH THE EMPLOYMENT AND PUBLIC ACCOMMODATION REQUIREMENTS OF THE ADA AND RELATED STATE LAWS?

The requirements of the ADA, in the employment area, apply to employers with 25 or more employees (15 or more employees effective 7/26/94). The corresponding state laws (Chapter 378, HRS), relating to unlawful discriminatory practices in employment, apply to an employer with one or more employees. Condominium associations with one or more employees must therefore observe the non-discriminatory employment requirements of state law.

In the area of public accommodations, Chapter 489, HRS, applies to any business, accommodation, refresh-

ment, entertainment, recreation, or transportation facility of any kind. In contrast, during the ADA's phase in period, the ADA is not applicable in the following instances:

- businesses employing 25 or fewer employees with gross receipts of \$1 millions or less cannot be sued until July 26, 1992; and,
- businesses with 10 or fewer employees with gross receipts of \$500, 000 or less cannot be sued until January 26, 1993.^[8]

WHO ARE PROTECTED BY THE ADA AND RELATED STATE LAWS?

Basically, the ADA and state laws in employment (Chapter 378, HRS), and public accommodations (Chapter 489, HRS) prohibit discrimination against otherwise qualified individuals with a "disability." The ADA defines "disability" as a physical or mental impairment that substantially limits one or more of an individual's major life activities; such as walking, breathing, hearing, seeing, learning, working or performing manual tasks.^[9] The state law barring discriminatory employment practices and discrimination in public accommodations (Act 33 SLH 1992) describes a qualified individual as one with a "handicap status." "Disability" and "handicap status," also include anyone having a record of such impairment, or being regarded as having such an impairment. The ADA, but not the state law, also includes anyone who is associated with an individual with a disability.^{[10], [11]}

It has been suggested that the ADA applies to over 900 disabilities.^[12] Some disabilities are obvious. Others are less evident, including dyslexia, epilepsy, diabetes, and testing positive for the AIDS virus.

THE ADA REQUIRES THE REMOVAL OF BARRIERS AND THE MAKING OF EMPLOYMENT ACCOMMODATIONS IN READILY ACHIEVABLE AND REASONABLE ACCOMMODATION CIRCUMSTANCES.

The ADA requires the removal of architectural and communication barriers in existing structures that are structural in nature when the removal is "readily achievable." However, if the removal is not readily achievable, the ADA requires that goods and services, facilities, privileges, advantages or accommodations be made available through other alternative means 28 Code of Federal Regulations §36.304. Relocating activities to accessible locations is an example of an alternative to the removal of a barrier 28 Code of Federal Regulations §36.305. What is meant by "readily achievable" is not clear. However, "an examination of government documents on the subject indicate the following: . . . The obligation to remove barriers does not require extensive restructuring or burdensome expense. However, there is no specific monetary formula to determine that an action is readily achievable. Factors to be considered in determining whether removal of a barrier is 'readily achievable' include: the nature and cost of the action needed; the overall financial resources of the facility itself; the overall financial resources of the parent corporation."^[13]

The ADA requires employers to make "reasonable [employment] accommodations," thereby providing disabled individuals equal opportunity to all aspects of employment. Reasonable accommodation includes a reasonable or logical adjustment made to a job, or to the work environment that enables a qualified person with a disability to

perform the functions of that employment position.^[14] Thus, a determination as to what is "readily achievable" and a "reasonable accommodation," depends on the facts and circumstances of each situation.

WHAT ARE THE CONSEQUENCES OF NON-COMPLIANCE?

An employer's violation of the ADA may result in payment of back pay and compliance with a court ordered injunction to stop the discrimination.^[15] State law provides somewhat similar remedies.^[16]

For discrimination in employment, the enforcing agency for ADA is the Equal Employment Opportunity Commission. For discrimination in public accommodations, the enforcing agency is the Department of Justice.

In Hawaii, the Hawaii Civil Rights Commission is the enforcing agency for violations of laws forbidding discrimination in employment, public accommodations and real property transactions. The Commission's functions and powers include the receipt, investigation, and conciliation of complaints alleging any unlawful discriminatory practice in any of the areas mentioned.

In the area of public accommodations, a qualified individual who has been discriminated against may bring a private lawsuit to obtain a court order to stop the discrimination. The individual may also file a complaint with the U.S. Attorney General. The Attorney General may file a lawsuit if there is reasonable cause to believe that any person or persons are engaged in a pattern or practice of discrimination or that the discrimination raises an issue of general public importance. Lawsuits may be brought to stop the discrimination and obtain money

damages and penalties. Civil penalties may be assessed in an amount not exceeding \$50,000 for a first violation and not exceeding \$100,000 for any subsequent violation. 42 United States Code Annotated §12188.

Violations of state laws barring discrimination in public accommodations may result in:

- a fine of not less than \$500, nor more than \$10,000 for each violation;
- civil suit brought by the State of Hawaii's attorney general or the Hawaii Civil Rights Commission to collect a fine (each day of the violation is considered a separate violation); or

- civil suit brought by the aggrieved individual. The judgment may be a sum not less than \$1,000, or threefold damages, whichever is greater and includes an award of attorney's fees and costs of suit.^[17]

In summary, both the ADA and State law counterparts raise many complex questions. These questions are best answered by competent professional advice from an attorney or with the guidance of the administering governing agencies.

For further implications for association's operations see related Act 171 (SLH 1992) reported in this issue on page 7.

MORE INFORMATION:

FOR A COPY OF THE ADA REGULATIONS CONTACT:

U.S. Department of Justice Office on the ADA (202) 514-0301

FOR A COPY OF THE BROCHURE: "ACCESSIBILITY GUIDELINES FOR BUILDINGS AND FACILITIES," CONTACT:

U.S. Architectural & Transportation Barriers Compliance Board
(202) 653-7843 FAX: (202) 653-7863;

FOR EMPLOYMENT QUESTIONS CONTACT:

Equal Employment Opportunity Commission (800) 669-EEOC
Hawaii Commission on Persons with Disabilities

Oahu 586-8121 FAX 586-8129
Hilo 933-4747
Kauai 241-3308
Maui 243-5441

FOR HAWAII LAW ON DISCRIMINATION IN EMPLOYMENT AND PUBLIC ACCOMMODATION CONTACT:

Hawaii Civil Rights Commission
888 Mililani Street, 2nd Floor
Honolulu, Hawaii 96813 586-8636 FAX 586-8655

NOTES

- 1 Gaul, Vickie L., "The Americans with Disabilities Act, Navigating Uncharted Waters," Common Ground, May/June 1992, pg. 32.
- 2 "... "Place of public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind whose goods, services, facilities, privileges, advantages, or accommodations extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors. . ." Section 489-2, Hawaii Revised Statutes.
- 3 Gaul, op. cit., p. 30.
- 4 42 U.S.C.A. §12182 (b) (2) (A) (iv).
- 5 28 CFR §36.304(b); part added to 28 CFR on July 26, 1991, published in the 56 Federal Register, No. 144, page 35597.
- 6 42 U.S.C.A. §12181 (7)
- 7 As used in this subchapter:
 - (1) Commerce
The term 'commerce' means travel, trade, traffic, commerce, transportation, or communication —
 - (A) among the several States;
 - (B) between any foreign country or any territory or possession and any State; or
 - (C) between points in the same State but through another State or foreign country.
 - (2) Commercial facilities
The term 'commercial facilities' means facilities
 - (A) that are intended for nonresidential use; and
 - (B) whose operations will affect commerce. 42 U.S.C. A. §12181 (1), (2).
- 8 Note to 42 U.S.C.A. §12181; 28 CFR §36.508 (b) supra p. 35603; and Russell, Marcia L., "We All Need To Know About The Americans With Disabilities Act," Real Estate Educators Association Journal, Spring 1992, pg. 14.
- 9 28 CFR §36.104 supra, pg. 35593
- 10 Russell, Marcia L., "We All Need To Know About The Americans With Disabilities Act," Real Estate Educators Association Journal, Spring 1992, pg. 11.
- 11 "The Americans with Disabilities Act" Your Center Report, printed in State of Hawaii Real Estate Commission Bulletin, June 1992, pg. 2
- 12 Russell, op. cit., p. 11.
- 13 "The Americans with Disabilities Act," op. cit., p. 3; 42 U.S.C.A. §12181 (9).
- 14 "The Americans with Disabilities Act," op. cit., p. 2
- 15 "The Americans With Disabilities Act" brochure, U.S. Department of Justice Civil Rights Division, Coordination and Review Section pg. 2.; 28 CFR §36.501–36.508 supra, pgs. 35602–35603.
- 16 Sections 378-5, 368-17, Hawaii Revised Statutes.
- 17 Section 489-7.5, 8, Hawaii Revised Statutes.

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This publication is designed to provide general information in regard to the subject matters discussed. This publication does not constitute legal, accounting, or other professional advice or service and should not be utilized as a substitute for professional service to address specific situations. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.

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- and distributing the annual operating budget;
- overrides any requirements in an association's declaration, by-laws, or other documents relating to preparation of budgets, calculation of reserve requirements, assessments, and funding of reserves;
- allows apartment owners whose association board fails to comply with the reserve law to enforce compliance by the board.

Act 189 did not change the "good faith" provision of Act 132. The "good faith" provision immunizes from liability any association or apartment owner, director, officer, managing agent, or employee of an association making a good faith effort to calculate the estimated replacement reserves should the estimate prove incorrect.

Act 173 Relating To Condominium Property Regimes Public Reports. (H.B. No. 2724, H.D.1, S.D.1., C.D.1)

Effective June 12, 1992

Before a developer sells or offers to sell any condominium project consisting of two or more apartments, the developer must register the project with the Real Estate Commission and disclose material information about the project in a public report. A public report expires thirteen months after the effective date. Act 173 amends the law by making it clear that developers must make a written request to the Real Estate Commission for an extension of the public report at least thirty calendar days prior to the report's expiration. However, for two-apartment condominium projects, Act 173 provides the Commission

with discretion to issue an order that the final public report have no expiration date. The order may be issued upon a written request to the Commission within thirty days prior to the expiration date of the final public report.

A final public report with no expiration date may be issued when one or both apartments are either retained by the developer, or conveyed to an irrevocable trust to benefit a spouse or family member of the developer. However, when a developer-retained apartment is subsequently sold the developer must provide the commission with written notification of the occurrence within thirty calendar days.

Act 171 Relating to Discrimination in Real Property. (H.B. No. 2496 H.D. 1, S.D. 1, C.D. 1) Effective July 1, 1992

The purpose of Act 171 is to conform Hawaii's Real Estate Transactions Law to the Federal Fair Housing Amendments Act of 1988.

Act 171, among other safeguards, protects persons with disabilities and families with children from housing discrimination. The Act also prohibits "steering," and adds "age" as a protected group in a real estate transaction, while still recognizing the special situation of housing designed for older persons.

"Steering" is defined as the practice of directing persons who seek to enter into a real estate transaction toward, or away from real property, in order to deprive them of the benefits of living in a discrimination-free environment.

Act 171 amends §515-3, Hawaii Revised Statutes, by making it a discriminatory practice to base certain real estate actions on the bases of "age" and "familial status." "Age" is

defined in the Act as being over the age of majority or an emancipated minor. "Familial status" is defined in the Act to include:


- a parent having legal custody of and domiciled with a minor child or children;
- a person who is domiciled with a minor child or children and who has written or unwritten permission from the legal parent;
- a person who is pregnant; or
- any person who is in the process of securing legal custody of a minor child or children.

Act 171 also makes every provision void in an oral agreement or written instrument, purporting to prohibit or restrict the conveyance, encumbrance, occupancy, lease, or use of property based on the individual's "familial status" or "age."

Act 171 appears to have specifically incorporated the Federal Fair Housing

Act of 1988 into Hawaii law, thereby making the following real estate actions, among others, unlawful:

- refusing to permit persons with handicapped status to make reasonable modification to existing premises for their full enjoyment or to grant them reasonable accommodations in rules, policies, practices, or services so that they may equally use and enjoy a housing accommodation;

 [Note: "Handicapped status" is defined under Act 171 to exclude persons who engage in "illegal" use of, or addiction to a controlled substance, alcohol or drug abuse and who threaten the property or safety of others.]

- failing to design and construct certain multi-family housing accommodations, intended for first occupancy after 3/13/91, to render them accessible to handicapped persons.

Act 50 Relating To Sales To Owner-Occupants. (H.B. No. 664, H.D. 2, S.D. 1, C.D. 2)
Effective April 29, 1992.

Part VI of Chapter 514A, Hawaii Revised Statutes, requires developers of most condominium projects to offer not less than 50% of the project to prospective owner-occupants. This requirement has resulted in long lines and camp-outs by persons desiring to purchase apartments as owner-occupants, and also has resulted in various alleged abuses of the law. Act 50 was enacted in response to these concerns. Act 50 specifically:

- 1) Provides the developer of condominium units a choice of a chronological system or a public lottery system as the method for taking owner-occupant reservations; and

- 2) Requires that a person's intent to be an owner-occupant be reaffirmed by affidavit at the time of closing and that the affidavit be recorded or made a part of the conveying document.

The Act also amends the definition of "owner occupant". Previously, the law defined a prospective owner-occupant as an individual who intends to occupy the condominium unit as a dwelling unit for 365 consecutive days. Act 50 redefines an owner-occupant as any individual in whose name sole or joint legal title is held in a residential unit which, simultaneous to such ownership, serves as the

individual's principal place of residence, as defined by the state department of taxation, for a period of not less than 365 consecutive days, and also requires the individual to retain complete possessory control of the unit during this period.

Act 50 makes it a misdemeanor to make a false statement or material misstatement of fact in an affidavit or in any filings with the Real Estate Commission.

Act 50 also provides exemptions for certain types of affordable housing projects.

**CONDOMINIUM
RESERVES
MANUAL
AND
SEMINAR**

**LEARN THE
"HOW-TO'S"
OF CONDUCTING
AND FUNDING
A
CONDOMINIUM
RESERVE STUDY!**

The Hawaii Real Estate Research and Education Center has developed a Condominium Reserves Manual to assist condominium associations and their boards in complying with the new law requiring existing condominiums to complete a reserve study for its 1993 fiscal year.

Each Registered Condominium Association Contact Person and each Registered Condominium Managing Agent will receive one (1) manual at no cost. It must be picked up and signed for at the reserves seminars by the CMA, Contact Person or a designee. (Unless mailing or other arrangements are made.) Additional manuals are available at \$30.00 each.

The Center will be presenting statewide seminars on the "how-to's" of conducting and funding a condominium reserve study utilizing the manual.

Please see the registration form enclosed with this issue of the Hawaii Condominium Bulletin for full details or call the Center at 956-7892 (1-800-642-4756 from the neighbor islands) for further information.